

ADMINISTRATIVE REMEDIES: SUSPENSION AND DEBARMENT

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ADMINISTRATIVE REMEDIES: SUSPENSION AND DEBARMENT

"Debarment reduces the risk of harm to the system by eliminating the source of the risk, that is, the unethical or incompetent contractor."

Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988)

"The way in which the Federal Acquisition Regulation is currently enforced gives large contractors an unfair advantage over smaller contractors. The companies that are suspended or debarred are nearly exclusively small contractors, as can be seen on the General Service Administration's List of Parties Excluded from Federal Procurement and Nonprocurement Programs ("GSA List"). One reason is that larger contractors have the financial means, plus high-priced attorneys, that enable them to work with the government on an alternative to suspension or debarment."

POGO Investigative Report: "Federal Contractor Misconduct: Failures of the Suspension and Debarment System" (May 2002)

"Suppose last month you received a show cause letter from the contracting officer demanding that you advise her why she should not terminate your company for default for lack of progress. This month's letter is even worse. You receive by certified mail, return receipt requested, a letter from the contracting officer suspending your company from doing business with the agency. It seems that the agency thinks someone in your company stole government stock footage and used it in a commercial training film. Welcome to the twilight zone, the world of suspension and debarment. You will have more at stake with fewer rights or protections than in any other area of federal procurement. By the time its over, you will feel as if you've lived through the Spanish Inquisition, or at least the Star Chamber."

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I. INTRODUCTION AND OVERVIEW.

- A. Policy. Protection of the Government's interest in contracting only with responsible contractors and not for purposes of punishment.
- B. Historical Background. Development of statutory and administrative debarments, the common rule, reciprocity, and policy/rulemaking groups.
- C. Regulatory framework for suspension and debarment, scope and effect.

- D. Due process required before denying or limiting a property or liberty interest.
- E. Effect of suspension or debarment on subsequent criminal prosecution.
- F. Trends. Renewed public interest in the suspension and debarment process, continued aggressive agency use of suspension and debarment, legislative initiatives, impact of acquisition reform, impact of rapid spending/contracting in support of the Global War On Terror, parallel proceedings.
- G. Miscellaneous issues. Lead agency, bankruptcy, waiver of suspension and debarment in plea agreements, term of suspension / debarment, administrative compliance agreements, and show cause letters.

II. POLICY BASIS FOR SUSPENSION AND DEBARMENT.

- A. Responsible Contractors, FAR 9.104-1. The underlying policy is that agencies may only contract with responsible contractors. FAR 9.402(a). Suspensions and debarments are discretionary measures that help to effectuate this policy. Id. Accordingly, the “[t]est for whether debarment is warranted is the present responsibility of the contractor.” Delta Rocky Mountain Petroleum, Inc. v. Dep’t of Defense, 726 F. Supp. 278, 280 (D. Colo. 1989). See also IMCO, Inc., v. United States, 33 Fed. Cl. 312 (Fed. Cl. 1995) (“The concept of “present responsibility” encompasses the contractor’s ability to successfully perform a contract.”)
- B. Protection of Government’s Interest – Not Punishment. Agencies may impose these remedies only to protect the Government and not to punish the contractor. FAR 9.402(b).
 - 1. The debarment sanction is a nonpunitive means of ensuring compliance with statutory goals. Janik Paving & Constr. v. Brock, 828 F.2d 84, 91 (2d Cir. 1987).
 - 2. These nonpunitive measures are justified because “[t]he security of the United States, and thus of the general public, depends upon the quality and reliability of items supplied by . . . contractors.” Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988).

III. HISTORICAL BACKGROUND.

A. Early Cases.

1. Debarment is a reasonable tool to protect the Government, but some administrative due process is necessary to assure a fair outcome. Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).
2. Government may suspend a contractor without prior notice, but must grant a swift post-deprivation opportunity to be heard. Horne Bros. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972).

B. 1980s - 1990s.

1. Courts generally uphold debarment decisions. Arbitrary and capricious standard of review. IMCO, Inc. v. United States, 33 Fed. Cl. 312, 316-17 (Fed. Cl. 1995).
2. Congress and Executive Branch attach debarment “triggers” to various laws:
 - a. Buy American, Davis Bacon, Walsh-Healey, Service Contract, Drug Free Workplace, and Clean Air/Clean Water Acts.
 - b. Immigration and Nationality Act Employment Provisions. Exec. Order No. 12,989.
 - c. Unfair Trade Practices. Statutes cited in FAR 9.403.
3. Ineligibility Provisions. Congress has included “ineligibility” provisions in various laws. Executive orders and initiatives also expand subject area of ineligibility determinations.
 - a. Military Recruiters on Campus. 10 U.S.C. § 983; Defense Federal Acquisition Regulation Supplement (DFARS) 209.470. Universities prohibiting military recruitment on campus are prohibited from receiving federal contracts and grants and will be placed on the GSA List. DFARS 209.470-3 (Procedures) and DFARS 252.209-7005 (contract clause). Universities with subordinate institutions of higher education (“subelements,” e.g., law schools) that prohibit senior ROTC or military recruiting on campus shall be debarred.
 - b. Terrorist Countries Can Only Have Small Contracts. Pursuant to 10 U.S.C. § 2327, SECDEF shall develop and

maintain a list of all firms and subsidiaries of firms that are not eligible for defense contracts due to ownership or control of the firm by a terrorist country. This prohibition does not apply to prime contracts at less than \$100,000. 10 U.S.C. § 2327(f)(1). Contracting officers shall not consent to any subcontract with a firm owned by the government of a terrorist country unless the agency head determines there is a compelling reason. DFARS 209.405-2.

- c. MOH Counterfeiters. Section 8118 of the FY99 Department of Defense Appropriations Act, P.L. 105-262, permanently prohibits the use of DOD appropriated funds, or other funds available to contracting officers, to award a contract to, extend a contract with, or approve the award of a subcontract to any person who within the preceding 15 years has been convicted under 18 U.S.C. § 704 of the unauthorized manufacture or sale of the Congressional Medal of Honor. DFARS 209.471.
- d. Child Labor. Exec. Order No. 13,126 (June 12, 1999) restricts the Government's purchase of goods made by forced or indentured child labor. The head of an agency may terminate a contract or suspend or debar a contractor that has furnished products made by forced or indentured child labor. FAR Subpart 22.15.

4. Administrative Debarments.

- a. Procurement. Federal Acquisition Regulation (FAR), Subpart 9.4; DFARS 209.4; Army Federal Acquisition Regulation Supplement (AFARS) 9.4; other agency supplements.
- b. Nonprocurement. (i.e., grants, cooperative agreements, other transaction agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for a specified use, and any other nonprocurement transactions between a Federal agency and a person).
 - (1) Debarment from federal assistance programs grants, loans, loan guarantees, etc., under Government-wide "Nonprocurement Common Rule" (NCR) at 32 C.F.R. Part 25 (Governmentwide Debarment and Suspension (Nonprocurement), and Requirements for Drug-Free Workplace (Grants)) See 68 Fed. Reg.

66534 (2003) for final rule implementing changes to the nonprocurement common rule.

- (2) How different from procurement debarments under the FAR?

A company *proposed* for debarment under the NCR is not immediately excluded from Government contracts unless the company was previously suspended. A company proposed for debarment under the FAR is immediately excluded. Also, difference in flow-down: procurement debarment flows down at most to first tier subcontractors, while nonprocurement debarment flows down to every tier affected by federal money.

- C. Reciprocity Between Procurement and Nonprocurement. Debarment under either the FAR or Common Rule results in ineligibility for both contracting and federal assistance programs. Exec. Order No. 12,689 (1989), 32 C.F.R. §25.110(c). See also 68 Fed. Reg. 66534 (2003).
- D. Government and Private Bar Groups' Impact on Policy/ Rulemaking.
1. Debarment, Suspension and Business Ethics Committee (DSBEC). One of 20 standing committees that report directly to the DAR Council. Membership comprised of Army, Navy, Air Force, Defense Logistics Agency, General Services Administration, National Aeronautics and Space Administration, Department of Interior, Small Business Administration, and the Department of Veteran's Affairs. Rotating chair (three-year term) appointed by Director, Defense Procurement.
 2. Interagency Suspension and Debarment Coordinating Committee (ISDC): a non-chartered committee chaired by EPA. Membership is comprised of 33 individual agency representatives of the Executive Branch. Coordinates policy, practices, lead agency, and sharing of information regarding various issues related to suspension and debarment. Serves as an advisory base for the Office of Management and Budget to examine possible changes in suspension and debarment.
 3. American Bar Association, Section of Public Contract Law, Committee on Suspension and Debarment. Consists of a Chair, Vice-Chairs, and committee members from the Government and private bar. Studies, discusses, and issues advisory opinions on suspension and debarment issues. The Section publishes a

deskbook on suspension and debarment, "The Practitioner's Guide to Suspension and Debarment" (updated in 2002).

- E. COFC Issues a Troubling Demand for Consistency. The Court of Federal Claims (COFC) set aside a U.S. Department of Agriculture (USDA) procurement suspension decision. The court ruled that the contracting activity's actions towards the contractor had been so logically inconsistent with the suspension that the action of the Suspension and Debarment Official (SDO) was arbitrary and capricious. The USDA had awarded a series of relatively small contracts to a firm during a period when the USDA had evidence that the firm had been dishonest in its prior dealings with the agency. The COFC held, in essence, that the USDA was arbitrary and capricious in later suspending the firm from federal contracting when it was competing for the award of much larger raisin contracts. Lion Raisin, Inc. v. United States 51 Fed. Cl. 238 (Fed. Cl. 2001).

IV. SUSPENSION.

- A. Suspension is an action taken by a suspending official under FAR 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting. FAR 2.101.
- B. Causes for Suspension. FAR 9.407-2 provides that a suspending official may suspend a contractor upon "adequate evidence" of any of the following:
1. Commission of fraud or a criminal offense in connection with: (a) obtaining, (b) attempting to obtain, or (c) performing a public contract or subcontract;
 2. Violation of Federal or State antitrust statutes relating to the submission of offers;
 3. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
 4. Violations of the Drug-Free Workplace Act of 1988 (Pub. L. No.100-690);
 5. Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in

the United States (see section 202 of the Defense Production Act (Pub. L. No. 102-558));

6. Commission of an unfair trade practice as defined in FAR 9.403;
7. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor; or,
8. Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

C. Standard of Proof for Suspension: Adequate evidence.

1. Suspensions must be based on adequate evidence and not mere accusations. Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972).
2. The FAR defines “adequate evidence” as information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 2.101.
3. “Adequate evidence” has been compared to that which is required to find probable cause sufficient to support an arrest or a search warrant. Transco Security, Inc. v. Freeman, 639 F.2d 318, 324 (6th Cir. 1981). Decision to suspend may be made without notice to the contractor but must include enough information for a meaningful response. Id.
4. An indictment for any of the causes listed in paragraph B, 1-7 above is “adequate evidence” for suspension. FAR 9.407-2(b). See also FAR 9.403 (an information or other filing charging a criminal offense is given same effect as indictment).
5. Suspension based on an indictment does not violate the presumption of innocence; agency would be irresponsible not to suspend a contractor indicted for procurement fraud. James A. Merritt & Sons, Inc. v. Marsh, 791 F.2d 328, 331 (4th Cir. 1986).
6. Allegations in a civil complaint may be “adequate evidence” to suspend a contractor, where the complaint is sufficiently detailed in information to enable suspending official to conclude it reasonable that the United States Attorney had compiled evidence supporting or corroborating the allegations, hence providing adequate

evidence. All Seasons Construction, Inc., et al. v. The Secretary of the Air Force, Civ. Action No. 05-1187 (W.D. La. 1995).

- D. Immediate Action Required. A legal basis for suspension is not enough to justify suspension. Suspension is appropriate only when, “it has been determined that immediate action is necessary to protect the Government’s interest.” FAR 9.407-1(b)(1).
- E. Period of Suspension. FAR 9.407-4.
 - 1. A suspension is a temporary measure imposed pending the completion of an investigation or legal proceeding. FAR 9.407-4(a). However, upon initiation of “legal proceedings,” suspension is indefinite until proceedings are completed or terminated by the suspending official. In such cases, suspensions exceeding three years have been upheld. Frequency Elecs., Inc. v. United States Dep’t of the Air Force, 1998 U.S. App. LEXIS 14888, 42 Cont. Cas. Fed. (CCH) ¶ 77330 (4th Cir. Va. July 1, 1998).
 - 2. General Rule. The period of suspension should not exceed 12 months if legal proceedings are not instituted within 12 months after the date of the suspension notice. The Department of Justice can request an extension of up to six additional months where no legal proceedings have been initiated. (The suspension may not exceed a total of 18 months unless legal proceedings have been instituted within that period.) FAR 9.407-4(b).

V. DEBARMENT.

- A. Debarment. Action taken by a debarring official under FAR 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable specified period. FAR 2.101.
- B. Causes for Debarment. FAR 9.406-2.
 - 1. The debarring official may debar a contractor for a conviction of or a civil judgment pursuant to FAR 9.406-2(a) for the following:
 - a. Commission of fraud or a criminal offense in connection with: (1) obtaining, (2) attempting to obtain, or (3) performing a public contract or subcontract;
 - b. Violation of Federal or State antitrust statutes relating to the submission of offers;

- c. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
 - d. Intentionally affixing a label bearing “Made in America” inscription (or any inscription having the same meaning) to a product sold or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. No. 102-558)); or
 - e. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.
- 2. Under FAR 9.406-2(b), a debarring official may also debar a contractor based upon a “preponderance of the evidence” for the following:
 - a. Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as:
 - (1) Willful failure to perform in accordance with the terms of one or more contracts; or
 - (2) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.
 - b. Violation of the Drug-Free Workplace Act of 1988 (Pub. L. No. 100-690); or
 - c. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. No. 102-558)) (Note: DFARS 209.406-2 requires a determination regarding debarment upon conviction of 10 U.S.C. § 2410f within 90 days of conviction. A determination not to debar requires a report to the Director of Defense Procurement, who will notify Congress within 30 days.);
 - d. Commission of an unfair trade practice as defined in FAR 9.403;

- e. Attorney General Determination – violation of Immigration and Nationality Act employment provisions (see EO No. 12989).
- 3. Under FAR 9.406-2(c), a contractor may be debarred for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

C. Debarment Criteria/Guidance.

- 1. Standard of proof for debarment is a preponderance of the evidence, which is proof that, compared with information opposing it, leads to the conclusion that the fact in issue is more probably true than not. FAR 2.101.
- 2. The mere existence of grounds for debarment does not mean that the debarring official must debar the contractor. Rich-Sea Pak Corp. v. Janet Cook, CV293-44 (S.D. Ga. 1993).
- 3. The debarring official should consider the seriousness of the offense and any remedial measures or mitigating factors. FAR 9.406-1(a). See Silverman v. United States Defense Logistics Agency, 817 F. Supp. 846 (S.D. Cal. 1993) (imposition of three year debarment arbitrary and capricious where debarring official failed to consider mitigating factors). Mitigating factors listed at FAR 9.406-1(a) are:
 - a. Existence of standards of conduct and internal controls at the time of the misconduct;
 - b. Disclosure of the misconduct to the Government;
 - c. Extent of contractor investigation;
 - d. Contractor cooperation in the Government's investigation;
 - e. Contractor payment of civil and criminal fines and restitution;
 - f. Implementation of disciplinary measures against wrongdoers;
 - g. Implementation of remedial measures;
 - h. Agreement by contractor to revise standards of conduct and internal controls;

- i. Amount of time contractor has to repair his organization; and
 - j. Contractor's management understands the seriousness of the misconduct and has implemented programs to prevent recurrence.
 - 4. Remedial measures must be adequate to convince the debarring official that the Government's interests are not at risk; the Government has broad discretion in ensuring the present responsibility of the contractor such that the remedial measures taken by the contractor adequately protect the Government's interests. Robinson v. Cheney, 876 F.2d 152, 160-61 (D.C. Cir. 1989).
 - 5. Aggravating Factors. Although the FAR does not list aggravating factors, some facts which bear directly on the present responsibility of the contractor are: (a) severity of the wrongdoing; (b) frequency and duration of the misconduct; (c) pattern or prior history of wrongdoing; (d) failure to accept responsibility for the misconduct; (e) positions of the individuals involved; (f) pervasiveness of the wrongdoing in the organization, and (g) failure to take complete corrective action.
- D. Period of Debarment. FAR 9.406-4.
- 1. General Rule. Debarment should be for a period commensurate with the seriousness of the offense. Generally, this period should not exceed three years, considering any periods of suspension with several exceptions:
 - a. Drug-Free Workplace Act. A violation of the Drug-Free Workplace Act may result in a debarment of up to five years. FAR 9.406-4(a)(1)(i).
 - b. Debarments based on Attorney General determinations of lack of compliance with the Immigration and Nationality Act employment provisions (FAR 9.406-2(b)(2)) shall be for one year. FAR 9.406-4(a)(1)(ii).
 - 2. Three years is not an absolute limit. Although the FAR sets three years as the general upper limit, the regulations do not prohibit an agency from debarring a contractor for a period greater than three years, providing a reasonable explanation for the extended period is provided. Coccia v. Defense Logistics Agency, 1992 U. S. Dist. LEXIS 17386 (E.D. Pa. 1992) (upholding a 15-year debarment).

3. The period of debarment may be extended if the extension is necessary to protect the interests of the Government; however, the extension cannot be based solely on the grounds supporting the original period. FAR 9.406-4(b). Court upheld extension of debarment period based on conviction for actions similar to those leading to fact-based debarment. Conviction was “new fact or circumstance.” Wellham v. Cheney, 934 F. 2d 305, 309 (11th Cir. 1991).
4. The debarring official may also reduce the period of debarment. FAR 9.406-4(c).

VI. SCOPE OF SUSPENSION AND DEBARMENT.

- A. Organizational Elements. Normally extends to all divisions or other organizational elements of a contractor unless the debarment decision is limited by its terms. FAR 9.406-1(b) and 9.407-5.
- B. Affiliates.
 1. Business concerns, organizations, or individuals where one either controls or has the power to control the other; or a third party controls or has the power to control both. FAR 2.101.
 2. Must be specifically named, given written notice, and offered an opportunity to respond. FAR 9.406-1(b) and 9.407-1(c).
 3. Indicia of control include interlocking management or ownership, identity of interests among family members. ALB Industries, 61 Comp. Gen. 553, B-207335 (1982) (shared facilities and equipment and common use of employees).
 4. “New Company.” A business entity organized following the suspension, debarment, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the ineligible contractor. Howema Bau-GmbH, B-245356, 91-2 CPD 214 (1991).
- C. Imputation.
 1. The fraudulent, criminal, or other seriously improper conduct of an individual may be imputed to the contractor when the conduct occurred in connection with the individual’s performance of duties on behalf of the contractor, or with the contractor’s knowledge, approval, or acquiescence. The contractor’s acceptance of the

benefit derived from the conduct is evidence of such knowledge, approval, or acquiescence. FAR 9.406-5(a) and 9.407-5.

2. Likewise, the misconduct of the contractor may be imputed to an individual within the organization upon a showing that the individual “participated in, knew of, or had reason to know of the contractor’s conduct.” FAR 9.406-5(b) and 9.407-5. “Should have known” is not sufficient to meet the requirement. Determination must be based on information actually available to the individual. Novicki v. Cook, 946 F.2d 938 (D.C. Cir. 1991).

VII. PUBLICATION / EFFECT OF A SUSPENSION OR DEBARMENT.

- A. Consolidated List of Contractors Debarred, Suspended, and Proposed for Debarment. The General Services Administration (GSA) maintains a consolidated list of all contractors debarred, suspended, and proposed for debarment. FAR 9.404.
- B. Web Site: Excluded Parties List System. The GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs is available at <http://www.arnet.gov/epls>. The web site is updated daily and is accessible free of charge.
- C. Government-Wide Exclusion. Agencies will not solicit offers from, award contracts to, renew or extend existing contracts with, or consent to subcontracts with contractors suspended, proposed for debarment, or debarred, unless the acquiring agency's head or designee determines in writing that there is a compelling reason to do so. FAR 9.405(b). In the Army, the debarring official makes that determination. AFARS 5109.405(a).
- D. Additional Effects.
 1. Exclusion from conducting business with the Government as representatives or agents of other contractors and from acting as individual sureties. FAR 9.405(c).
 2. Exclusion from nonprocurement transactions with the Government such as grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. E.O. 12549.

3. Restrictions on subcontracting. FAR 9.405-2.
 - a. Subcontracts subject to Government consent may only be approved/awarded if the agency head states in writing that there are compelling reasons to do so.
 - b. Contractors may not enter into subcontracts in excess of \$25,000 with suspended, proposed for debarment, or debarred contractors, unless there is a compelling need.
- E. Sales Contracts. Suspension from procurement contracts does not automatically suspend a contractor from sales contracts (contracts to buy items from the Government). Alamo Aircraft Supply, B-252117, Jun. 7, 1993, 93-1 CPD 436. The DLA Special Assistant for Contracting Integrity is the exclusive representative of the Secretary of Defense to suspend and debar contractors from the purchase of federal personal property. DFARS 209.403 (3).
- F. Continuation of Current Contracts.
1. Agencies may continue with current contracts or subcontracts despite suspension, the proposed debarment, or debarment of a contractor. FAR 9.405-1(a). Agencies are restricted, however, in their ability to place orders, exercise options, or otherwise extend duration without the written determination of compelling reasons. FAR 9.405-1(b).
 2. IDIQ Contracts. If the contract's guaranteed minimum amount has been met or exceeded, no further orders may be placed against the contract. FAR 9.405-1(b); DFARS 209.405-1(b); see also Procurement Fraud Division Note, The Army Lawyer, Dec. 2001 at 35.
 3. Contract Termination. Termination for default may be appropriate where fraud and termination involve same contract. Daff v. United States, 78 F. 3d 1566, 1573-74 (Fed. Cir. 1996) (fraud in performance of defaulted contract); Brown Constr. Trades, Inc. v. United States, 23 Cl. Ct. 214, 216 (1991) (fraud involving the "very contract" that was terminated for default); Morton v. United States 757 F.2d 1273 (Fed. Cir. 1985) (default termination of a "large, sophisticated contract" sustained based on fraud involving a single change order). However, where contractor misconduct and debarment involves another contract, default termination of unrelated contract likely not appropriate. Giuliani Assocs., Inc., ASBCA Nos. 51672, 52538, 2003-2 BCA ¶ 32,368.

VIII. DUE PROCESS.

A. *De Facto* Debarments. *De facto* debarments are not permitted.

1. An agency cannot simply refuse to contract with a contractor without providing the procedural safeguards afforded a contractor facing debarment. Art Metal-USA, Inc. v. Solomon, 473 F. Supp. 1, 5 (D.D.C. 1978). Agency actions that effectively exclude a contractor without these safeguards may constitute an impermissible *de facto* debarment. Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980) (Plaintiff sued defendant government after government rejected its bids on account of plaintiff's alleged lack of integrity. Plaintiff claimed it was denied due process because it was not notified of the charges against it and had no opportunity to respond. The district court rejected plaintiff's claims and entered judgment in favor of defendant. The court of appeals held that government's conduct injured a liberty interest of plaintiff; namely, plaintiff's right to be free from stigmatizing governmental defamation. As a result of government's conduct, plaintiff lost government employment and was foreclosed from other employment opportunities.)
2. Repeated nonresponsibility determinations may constitute a *de facto* debarment; fair play requires that if an agency is going to debar a contractor, it must use the debarment procedures. Leslie & Elliot Co. v. Garrett, 732 F. Supp. 191, 197-98 (D.D.C. 1990). But see Cubic Corp. v. Cheney, 914 F.2d 501 (D.C. Cir. 1990) (nonresponsibility determination is not the equivalent of a suspension if it is based on the contractor's lack of integrity).
3. Government may not maintain a list of contractors that it deems not to have complied with a law, regulation, or executive order unless the contractors have been afforded due process prior to placement on the list. Such practice is tantamount to debarment. Illinois Tool Works v. Marshall, 601 F.2d 943 (7th Cir. 1979).
4. Intent: the Key Issue. *De facto* debarment occurs when the government uses nonresponsibility determinations as a means of excluding a firm from government contracting or subcontracting, rather than following the debarment regulations and procedures set forth at FAR Subpart 9.4. A necessary element of a *de facto* debarment is that an agency intends not to do business with the firm in the future. Quality Trust, Inc., B-289445, 2002 U.S. Comp. Gen. LEXIS 21.

- B. Procedural Due Process. See *generally* DFARS, Appendix H.
1. Notice.
 - a. The contractor is provided written notice of the proposed action. A copy of the administrative record usually accompanies the notice. FAR 9.406-3(c).
 - b. The contractor has 30 days within which to submit in person, or in writing, opposition to the action. FAR 9.406-3(c)(4).
 2. Debarring Officials. DFARS 209.403.
 - a. Army. Commander, U.S. Army Legal Services Agency is the primary “debaring official” for Department of the Army. In addition, AFARS 5109.403 provides that the Army has three overseas “debaring officials:” (1) Deputy Judge Advocate, U.S. Army Europe and Seventh Army; (2) Staff Judge Advocate, U.S. Army South; and (3) Staff Judge Advocate, U.S. Eighth Army.
 - b. Navy: General Counsel of the Navy.
 - c. Air Force: Deputy General Counsel (Contractor Responsibility).
 - d. Defense Logistics Agency: The Special Assistant for Contracting Integrity.
 3. Nature of proceedings—two step debarment process:
 - a. Step 1: Presentation of matters in opposition.
 - b. Step 2: Fact finding procedure—occurs only when the contractor’s presentation during Step 1 raises a genuine dispute over a material fact.
 4. Presentation of Matters in Opposition. DFARS H-103.
 - a. Contractor submits, in writing or through a representative, information and argument in opposition to the proposed action, to include any information that may raise a material issue of fact. Written matters in opposition must be submitted within 30 days from receipt of notice of action. DFARS H-103(c).

- b. In-person presentation. DFARS H-103(b).
 - (1) Informal meeting, non-adversarial in nature.
 - (2) SDO and/or agency representatives may ask questions.
 - c. Contractor may, within five days of submitting these matters, submit a written statement outlining the material facts in dispute, if any. DFARS H-103(a).
5. Fact-finding Proceeding. This is necessary if material facts are in dispute. DFARS H-104(a).
- a. The SDO designates a fact-finder to conduct a fact-finding proceeding. DFARS H-104(a). Under Army practice, if the suspending and debarring official determines that there is a genuine dispute as to a material fact, he will appoint a military judge to conduct a hearing.
 - b. Procedures.
 - (1) Normally held within 45 working days of the presentation of matters in opposition. DFARS H-104(b).
 - (2) Government and contractor may appear in person and present evidence DFARS H-104(c).
 - (3) Federal Rules of Evidence and Civil Procedure do not apply. Hearsay may be presented. DFARS H-104(d).
 - (4) Live testimony is permitted. DFARS H-104(e).
 - c. The fact-finder will provide written findings of fact to the SDO. DFARS H-106(a). Standard of proof: preponderance of the evidence. DFARS H-106(b).
6. Notice of decision. The suspending and debarring official will notify the contractor of his decision promptly. DFARS H-106(d).
7. Review of Suspending and Debarring Official's decision.
- a. No agency review.

- b. Judicial review. An agency's decision to debar a contractor is subject to review under the Administrative Procedures Act. Burke v. EPA, 127 F. Supp. 2d 235, 238 (D.D.C. 2001). The agency decision is subject to an arbitrary and capricious standard of review. Id.
- c. Exhaustion of administrative remedies required before court will review administrative process. Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F. 2d 163 (D.C. Cir. 1983). CONSPEC Marketing and Manufacturing Co., Inc. v. Gray, 1992 U.S. Dist. LEXIS 2845 (D. Kan. 1992).
- d. APA Review limited to administrative record unless contractor can make a strong showing of government bad-faith or improper conduct in making the decision. Alabama-Tombigbee Rivers Coalition v. Norton, 2002 U.S. Dist. LEXIS 1769, Jan. 29, 2002.

IX. EFFECT ON A SUBSEQUENT CRIMINAL PROSECUTION.

- A. Double Jeopardy Clause. The double jeopardy clause is not a bar to a later criminal prosecution because debarment sanction is civil and remedial in nature. The mere presence of a deterrence element is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals." Hudson v. United States, 118 S. Ct. 488 (1997).
- B. Debarment is a "Civil Proceeding," Not a Criminal Penalty. In United States v. Hatfield, 108 F.3d 67, 69-70 (4th Cir. 1997), the court concluded debarment is a "civil proceeding," not a criminal penalty.

X. TRENDS.

- A. Aggressive Use of Suspension and Debarment. Agencies continue the aggressive use of suspension and debarment. See Steven A. Shaw, Suspension and Debarment: The First Line of Defense against Contractor Fraud and Abuse, The Reporter, Vol. 26, No. 1. Army pursues greater use of Administrative Compliance Agreements and tailored terms of debarments.
- B. Enhanced Congressional interest regarding contractor ethics?
 - 1. H.R. 1218, Contractor Responsibility: To require contractors with the Federal Government to possess a satisfactory record of integrity and business ethics.

2. H.R. 2767, Contractor Accountability Act: To Improve Federal agency oversight of contracts and to strengthen accountability of the Governmentwide debarment and suspension system.
3. H.R. 746: A bill to prohibit the Federal Government from entering into contracts with companies that do not include certification for certain financial reports required under the Securities Exchange Act of 1934.
4. S. 1072, Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003: Part of the DOT Authorization Act (Sec. 307, "Contractor Suspension and Debarment Policy; Sharing Fraud Monetary Recoveries"); mandates mandatory debarment of anyone who is convicted of fraud on any projects involving highway trust funds, and mandatory suspension of anyone indicted for fraud, subject to the approval of the Attorney General of any contractor.

C. Impact of Acquisition Reform on Suspension and Debarment.

1. Acquisition Reform and Government oversight of contractors: what is the proper balance?
2. Emphasis on review of past performance raises "de facto debarment" concerns.
3. Some certification requirements eliminated by regulations implementing the Clinger-Cohen Act of 1996 (subcontractor kickbacks, negotiation representations, commercial item certifications).
4. Amendments to the Procurement Integrity Act, 41 U.S.C. § 423, eliminated procurement integrity certifications.
5. "Partnering with contractors" philosophy raises concerns of overlooking fraud.

D. GSA CODE FF: Restrictions on Employment of Contractors Convicted of Fraud under DOD contracts. It is unlawful for defense contractors to employ persons convicted of defense-contract related felonies. 10 U.S.C. § 2408. DFARS 203.570-2 implements that statute as follows:

(a) A contractor or subcontractor shall not knowingly allow a person, convicted after September 29, 1988, of fraud or any other felony arising out of a contract with the DoD, to serve-

(1) In a management or supervisory capacity on any DoD contract or first-tier subcontract;

(2) On its board of directors;

(3) As a consultant, agent, or representative; or

(4) In any capacity with the authority to influence, advise, or control the decisions of any DoD contractor or subcontractor with regard to any DoD contract or first-tier subcontract.

See also DFARS 252.203-7001.

- E. DOJ "Parallel Proceedings Philosophy." Cases are evaluated from initiation for civil as well as criminal action. Encourages aggressive use of suspension and debarment remedy.
- F. Progress Payment Fraud. A recent Sixth Circuit case illustrates difficulties in obtaining a conviction for progress payment fraud where the contractor has paid some, but not all, subcontractors. United States v. Gatewood, 173 F.3d 983 (6th Cir. 1999).

XI. MISCELLANEOUS ISSUES.

- A. Lead Agency Determinations: "Yockey Memorandum," September 28, 1992. Agency with the predominant financial interest" will assume lead to debar. Subcontracting interests also considered. Issue: how do we determine predominant financial interest? Sheer dollar amounts; dollar amounts in current fiscal year, or over a period of time; "importance" of program?
- B. Bankruptcy. Automatic stay provisions of the U.S. Bankruptcy Code do not prohibit suspension and debarment. Eddleman v. U.S. Dep't of Labor, 923 F.2d 782 (10th Cir. 1991) (DOL's pursuit of debarment was primarily to prevent unfair competition in the market by companies who pay substandard wages and thus a proper exercise of its police power and thus not subject to automatic stay).
- C. Waiver of Suspension and Debarment Remedy in Plea Agreements. AUSAs have no authority to waive the remedy.

- D. Show Cause Letters. Inquiries from agencies to contractors where there is insufficient evidence of misconduct to suspend or debar. Highly recommended by Yockey Memorandum: “[w]hen appropriate prior to suspension, I want companies to be informed that we have extremely serious concerns with their conduct, that their suspension is imminent and that they may contact the suspension official, or his designee, if they have any information to offer on their behalf.”

XII. ADMINISTRATIVE COMPLIANCE AGREEMENTS.

A. Desired Preconditions.

1. Restitution.
2. Correction of the flawed procedures that resulted in the misconduct.
3. Discipline of blameworthy individuals.
4. Assurance that appropriate standards of ethics and integrity are in place and are working.
5. Otherwise satisfactory contract performance.
6. SDO is convinced that contractor is not so lacking in present responsibility as to threaten integrity of Government procurement.

B. Common Features.

1. Term of three years.
2. Company has installed an ethics code, government contracting policies and procedures, and other appropriate controls (quality control, internal audit, personnel background checks, etc.). Periodic training of employees.
3. Contractor-financed outside audits of the ethics process and other corrective action. Employment of ombudsman (external) and/or ethics director (internal).
4. Periodic reporting to debarring official.
5. Provision for compliance visit by enforcing agency.
6. Violation of the terms of the agreement is separate grounds for debarment.

7. Administrative fee to reimburse expenses associated with compliance visits.
 8. Investigative cost reimbursement where substantiated and unusually high due to contractor lack of cooperation.
- C. Interrelationship with *qui tam* cases: Ninth Circuit Muddies the Water. The relator filed a *qui tam* action against the corporation, his former employer, for submitting falsified records to the United States and failing to complete all required testing of flight data transmitters (FDTs). The United States intervened in the suit, settled it, and paid the relator his share of the recovery. The United States then prosecuted a criminal case based on the corporation's (1) false reporting, (2) incomplete testing, and (3) use of inadequate damping fluid in the FDTs. After that case ended, the relator filed another *qui tam* action based on the corporation's use of the inadequate damping fluid. The United States declined to intervene, and the corporation obtained dismissal of the second civil suit. The United States initiated a debarment proceeding against the corporation. After those two parties settled that proceeding, the relator sought a share of the cash payment promised as part of the settlement. The district court denied his motion for an order directing the United States to give him a share of those proceeds. The instant court reversed. The debarment proceeding was an "alternate remedy" within the meaning of 31 U.S.C. § 3730(c)(5). The court reversed and remanded for further proceedings. Further, the court noted that if the relator was entitled to receive a share of the settlement, he was entitled to a share of all the proceeds recovered, not just the cash portion of the settlement. United States ex rel. Barajas v. United States, 238 F.3d 1004 (9th Cir 2001).

XIII. SUSPENSION / DEBARMENT: SUMMARY AND CONCLUSION.

- A. DOD agencies continue to use suspension and debarment as an effective fraud-fighting tool. Civilian agencies are increasingly interested in expanding the use of the remedy.
- B. Legislative and Executive Branches continue to use suspension and debarment to enforce social policy.
- C. Important to coordinate suspension and debarment actions among all agencies with interests due to reciprocal effects.

XIV. COORDINATION OF REMEDIES

A. References.

1. Department of Defense Directive 7050.5, Subject: Coordination of Remedies for Fraud and Corruption Related to Procurement Activities, 7 June 1989 [DOD Directive 7050.5].
2. Federal Acquisition Regulation (FAR), Subpart 9.4 – Debarment, Suspension, and Ineligibility.
3. Defense FAR Supplement (DFARS), Subpart 209.4 – Debarment, Suspension, and Ineligibility.
4. Defense Logistics Agency Regulation 5500.10, Subject: Combating Fraud in DLA Operations.
5. Army Regulation 27-40, Litigation, Chapter 8, Remedies in Procurement Fraud and Corruption, 19 September 1994 [AR 27-40].
6. SECNAV INSTRUCTION 5430.92B, Subject: Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties within the Department of the Navy.
7. Air Force Policy Directive 51-11, Subject: Coordination of Remedies for Fraud and Corruption Related to Air Force Procurement Matters, 21 October 1994.
8. Air Force Instruction 51-1101, Subject: The Air Force Procurement Fraud Remedies Program. 21 October 2003.

B. Introduction.

1. Agency regulations implement DOD Directive 7050.5. Copy found at Appendix D, AR 27-40.
2. The fraud mission established in DOD Directive 7050.5. Each of the DOD Components shall monitor, from its inception, all significant investigations of fraud to ensure all appropriate remedies are pursued expeditiously.
3. The “inception” of a fraud investigation.
4. DODIG oversight responsibility.

5. Determination of Lead Agency Responsibility. Interagency coordination is required in cases where the contractor has contracts with more than one federal agency. The DOD agency that has the predominant financial interest should be designated the "lead agency." Yockey Memorandum (Under Secretary of Defense, September 28, 1992). That agency has authority to suspend or debar the contractor. In the event of disputes among DOD agencies on this issue, the matter will be referred to the Director of Defense Procurement for resolution.

C. Remedies.

1. Criminal prosecution.
2. Civil litigation.
3. Contract remedies.
4. Administrative remedies.
5. Suspension and debarment.
6. Administrative settlement agreements.

D. Key Elements of the Army Procurement Fraud Program.

1. Procurement Fraud Branch (PFB) is single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army Procurement.
2. Fraud remedies coordination assures that commanders and their contracting officers take, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.
3. Decentralized responsibility upon the local commander for operational matters such as reporting and remedial action.
4. Continuous case monitoring by The Judge Advocate General's PFB from the time suspected fraud is first reported until final disposition.
5. Command-wide fraud awareness training.

E. PFB Management Responsibilities.

1. Coordinate disposition of, and monitor, Army contract fraud and corruption cases.
2. Coordinate remedies.
3. POC for receipt and dissemination of DOD safety alerts in fraud cases.
4. POC in Army for voluntary disclosure cases.
5. Maintain active liaison with USACIDC, DCIS, and other investigative agencies.
6. Coordinate with DOJ and United States Attorneys regarding significant civil and criminal procurement fraud cases.

F. MACOM and Subordinate Command Programs.

1. SJAs at MACOMs appoint a Procurement Fraud and Irregularities Coordinator (PFIC) for their command.
2. Chief Counsel and SJAs at Major Subordinate Commands with procurement advisory responsibility appoint an attorney as a Procurement Fraud Advisor (PFA) to manage the fraud program at their installations.
3. Reports/Recommendations transmitted through command channels to the PFIC for the affected MACOM.
4. PFAs and PFICs assure prompt notification of appropriate local CID or DCIS activities.

G. Procurement Fraud Advisors (PFAs): The Key To A successful Program.

1. Attorneys.
2. Qualifications -- Working knowledge of procurement, criminal, and civil litigation law, and familiarity with government agencies in the acquisition area.

H. PFA Tasks and Responsibilities.

1. Recognize the indicators of possible procurement fraud or irregularity and help identify potential cases.

2. Prepare Flash Reports (AR 27-40, para. 8-5b).
 - a. Required for all cases if there is substantial indication of fraud and/or the matter is referred for investigation.
 - b. Dispatch immediately to PFB and major command by fax. (PFB fax is (703) 696-1559).
3. Coordinate investigative and remedial actions at the installation/activity.
 - a. Provide support to criminal investigators and coordinate remedies actions with them.
 - b. Coordinate remedial actions and necessary participation by installation/activity personnel. Make sure that funds recovered in fraud recoveries that can be returned to the agency (rather than the U.S. Treasury) are credited to agency accounts, such as where contracts remain open. Obtain necessary fund citations and accounting classifications. Determine whether settlements can include return of products or services as well as money.
 - c. Interface with local DOJ officials.
 - d. Help identify and solve systemic or internal control breakdowns that may have contributed to problems.
4. Prepare comprehensive remedies plan (AR 27-40, para. 8-8).
 - a. Should be prepared in close coordination with investigators and contracting officer but is PFA's responsibility.
 - b. Must consider all remedies.
 - c. Must consider adverse impact and safety concerns. Should support preparation of a comprehensive victim impact statement (VIS).
 - d. Forward VIS to PFB and the major command in significant cases.

- e. Significant cases defined as cases involving:
 - (1) Loss greater than \$100K;
 - (2) Top 100 DOD company;
 - (3) Bribery, gratuities, or conflict of interest; or
 - (4) Safety Issues.
- 5. Assist in preparation of necessary contracting officer's report (DFARS 9.406-3) and litigation reports (para. 8-9, AR 27-40).
- 6. Inform MACOM and PFB of initial contact with U.S. Attorney's Office or DOJ.
- 7. Acts as installation/activity central coordination point for fraud matters.
- I. Features of Successful Installation Level Procurement Fraud Programs.
 - 1. An effective working relationship between the criminal investigator, the PFA, and contract officers.
 - 2. An aggressive approach that includes fraud awareness training and informational activity by the PFA.
 - 3. An effective working relationship between the local U.S. Attorney's Office and the installation command counsel/staff judge advocate.
 - 4. An active installation case management team and/or coordinating committee which both facilitates remedies coordination in individual cases and identifies and solves management/ internal controls weaknesses.
 - 5. Command support.

XV. CONCLUSION.

Headquarters U.S. Air Force

Integrity - Service - Excellence

Suspension and Debarment



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U.S. AIR FORCE



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Introduction



- Contractor Responsibility
 - Coordination of Fraud Remedies
 - Suspension and Debarment



U.S. AIR FORCE

Fraud Remedies



- **Criminal**
- **Civil**
 - False Claims Act
 - Qui tam
- **Contractual**
- **Administrative**



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Suspension & Debarment



- Protects government from non-responsible contractors
- Not punishment
- BUT:
 - **Collateral consequences** provide significant benefits to investigators



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Suspension & Debarment



- Collateral consequences
 - Aids factual investigations
 - Discovery of defense theories
 - Lock in target's story
 - Encourages early pleas and settlements



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Debarment & Suspension



■ Effect

- Ineligibility for new contracts

– <http://epls.arnet.gov/>

- Permanent record

– Key investigative tool



U.S. AIR FORCE

EPLS August 2005



	Name	Action Date	Archive Date	CT Code
1	Branch, Kenneth V.	24-Jul-2003	null	B
.		24-Jul-2003	null	S
2	Erskine, William David	24-Jul-2003	null	B
.		24-Jul-2003	null	S
3	Satchell, Larry Dean	24-Jul-2003	null	B
.		24-Jul-2003	null	S
4	The Boeing Company, Boeing Launch Services	24-Jul-2003	07-MAR-2005	B
.		24-Jul-2003	07-MAR-2005	S
5	The Boeing Company, Launch Systems	24-Jul-2003	07-MAR-2005	B
.		24-Jul-2003	07-MAR-2005	S



U.S. AIR FORCE

Debarment & Suspension



■ Misconduct

- Crimes --- re: integrity

- Contract performance

 - “Willful” failure to perform or

 - History of poor performance

- Any other “serious” cause



U.S. AIR FORCE

Debarment & Suspension



- Based on court proceeding
 - Suspension
 - Indictment
 - Proposed Debarment
 - Conviction
 - Civil judgment
- Based upon evidence
 - Suspension – “adequate evidence”
 - Debarment – “preponderance of evidence”



U.S. AIR FORCE

Debarment Procedure



- **Suspension**
 - Pending completion of legal proceeding/investigation

- **Proposed debarment**
 - 30 days to respond

- **Debarment**
 - “generally” 3 years



U.S. AIR FORCE

Debarment Procedure



- Contractor disputes the facts
 - Fact-finding proceeding
 - Limited remedy
 - Federal District Court; abuse of discretion
- Contractor concedes the facts
 - Contractor debarred, *unless*
 - Demonstrates present responsibility



U.S. AIR FORCE

Fact-Finding Proceeding



- “Genuine dispute of material fact”
- Mini-trial
 - Testimony under oath
 - Findings of fact
- Discovery
 - Limited to AR
 - Gov’t learns contractor’s case



U.S. AIR FORCE

Factors in Demonstrating Responsibility



- Standards of conduct
- Voluntary disclosure
- Internal Investigation
- Full cooperation
- Paid costs/restitution
- Disciplined employee
- Implement remedial actions
- Ethics training
- Adequate time
- Management recognition of problem



U.S. AIR FORCE

Administrative Agreements



- Documents remedial measures
- Outside reviews by consultants
- Ethics program improvements
- Monthly reports to AF (GCR)
 - Litigation and investigations
 - Ethics hotline calls
 - Internal investigations



U.S. AIR FORCE

Boeing Allegations



■ **1998 Allegations**

- Ethics program unclear
- Limited disclosures
- PIA compliance training insufficient
- No management recognition

■ **Druyun Hiring Allegations**

- Internal investigation fully disclosed
- Full communication with customers
- Strong management ownership
- Termination of employees
- No evidence of corporate responsibility



U.S. AIR FORCE

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